



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/919,961	08/02/2001	Thomas M. Collins	2280.2770	4327
5514	7590	04/05/2005		
FITZPATRICK CELLA HARPER & SCINTO 30 ROCKEFELLER PLAZA NEW YORK, NY 10112				
			EXAMINER MADSEN, ROBERT A	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 04/05/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/919,961

Applicant(s)

COLLINS ET AL.

Examiner

Robert Madsen

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 04 February 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 5-16 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1, 5-16 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on February 4, 2005 has been entered. Claims 18-22 have been cancelled. Claims 1, 5-16 remain pending.

Claim Rejections - 35 USC § 103

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. Claims 1, 5-7, 9, 12-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Laval Jr. (US 2837042) in view of Nishi (JP 61035748) and Boyce et al. (US 5996768). See the Office Action mailed March 31, 2004.

4. Claims 8, 10, and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Laval Jr. (US 2837042) in view of Nishi (JP 61035748) and Boyce et al. (US 5996768) as applied to claims 1, 5-7, 9, 12-15 above, further in view of Ackley (EP0915014A). See the Office Action mailed March 31, 2004.

Art Unit: 1761

5. Claim 16 is rejected under 35 U.S.C. 103(a) as being unpatentable over Laval Jr. (US 2837042) in view of Nishi (JP 61035748) and Boyce et al. (US 5996768) as applied to claims 1, 5-7,9,12-15 above, further in view of Morishita et al. (JP 63196229 A). See the Office Action mailed March 31, 2004.

Response to Arguments

6. Applicants' arguments filed February 4, 2005 have been fully considered but they are not persuasive.

7. Applicants assert that Laval does not teach placing candy pellets on firm material. The Examiner understands that claim does not recite any firmness limitation, but the Office Action of March 31, 2004 made the reference to the firmness to illustrate that the particular means of adhering a candy pellet to an edible substrate (i.e. bonding agent with a recess or not) depends on the firmness of the substrate (See paragraph 4 in light of paragraph 5 of the Office Action mailed March 31, 2004). The Examiner maintains that one of ordinary skill in the art would conclude that Laval is referring to a firm textured cereal, as opposed to a soft, pliable cereal dough Laval teaches the substrate may be cereal granules or dough from which the cereals are made, which implies the cereals are the finished/cooked/firm product made from dough (Column 2, lines 38-42). Laval teaches in the prior art pellets will not stick to the cereals even when the pellets are forced to contact the cereals with air blasting (Column 1, line 60-69), and Laval teaches the pellets will adhere to the cereal using air pressure to force when a bonding agent is used (Column 6, lines 34-47, 67-71), while dough is pliable enough to

allow the pellets to be embedded into the dough via forced ejection (Column 9, lines 70-75). Furthermore, Laval further teaches the cereal granules are breakfast cereals, which are conventionally non-pliable material (Column 1, line 25-50). Thus, Laval does lead one to conclude that the cereals are a firm texture.

8. Applicants further contend that Laval does not teach a recess for holding the candy pellets therein, but a perforation is provided to receive a bonding agent. The Examiner notes claim 1 does not recite a recess for holding the pellets *therein*, but a recess for receiving the pieces. As such, the pellet does not have to be held within the recess. Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). The Examiner maintains a recess is created when the perforation is made, and, with the bonding agent in the recess, the recess is for receiving the pellet shape.

9. Applicants further argue that the forceful ejection of the pellets of Laval is contrary to the use of a firm substrate and teaches away from a chocolate tablet. It is noted that a *firm* chocolate tablet is not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

10. Applicants contend that because Laval's second embodiment describes soft cookie dough and includes an oven for cooking the dough, one of ordinary skill in the art would not have found Laval to suggest the presently claimed method of decorating a

Art Unit: 1761

chocolate tablet with candy pellets in the recess of the chocolate using carrier bars with pockets. However, Laval teaches an apparatus of article handling (Column 1, lines 15-24) wherein such an apparatus involves: supplying a substrate, supplying a pellet candy via a drum conveyor to the substrate in a desired pattern, and the method of adhering the pellets to the substrate. Laval does not limit the article handling system to a cooking operation, nor does Laval limit the article handling system to a particular substrate (Column 1, lines 70 to Column 2, line 11). Furthermore, while Laval does not teach a chocolate tablet per se or the use of carrier bars with pockets, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Nishi and Boyce for the reasons stated in the Office Action mailed March 31, 2005 provide motivation for modifying the method of Laval to include a chocolate tablet and use of carrier bars with pockets.

11. With respect to Applicants' argument that Boyce does not teach or suggest a carrier bars with pockets for the arrangement of pellet shaped candies on a chocolate tablet, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). The primary reference Laval teaches a drum conveyor used to arrange candy pellets in a predetermined pattern on an edible substrate. Boyce et al. teach conventional drum conveyors do not allow for quick changeovers to accommodate

Art Unit: 1761

various pellet orientation and sizes, and by using carrier bars with the pockets on a drum conveyors one is able to quickly change over the drum to various orientation and sizes. Thus Boyce et al. provides motivation to modify Laval's method of pellet handling: by using carrier bars with pockets instead of the drum conveyor taught by Laval one provides a more easily convertible pellet handling method that adapts to size and orientation changes of candy pellets.

12. In response to Applicants' argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning with respect to combining Nishi with Laval to teach chocolate substrates, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). As discussed above in paragraph 10, Laval teaches a method of applying candy pellets onto edible substrates in a predetermined pattern. Nishi teaches chocolate is a conventional substrate to which it is desired to apply decorative candy pieces in a predetermined arrangement. Thus, Nishi provides motivations to select chocolate as the substrate since this is desired type of decorative substrate.

13. With respect to Ackley and Morishita, Applicant states that the art of record does not disclose or suggest the claimed embodiments of a ramp conveyor or printing step.

Art Unit: 1761

With respect to Ackley in particular, it is noted that Ackley teaches a ramp conveyor as an art recognized equivalent to a pellet handling drum conveyor with the same handling requirements taught by Laval. With respect to Morishita, Morishita is relied on including a step of printing on the pellets. Like Nishi, Morishita teach it is well known to pre-decorate edible items prior to applying them to an edible substrate, and thus provide motivation for including a printing step on the pellets of Laval, depending if one desired decorated pellets or not.

Conclusion

14. All claims are drawn to the same invention claimed in the application prior to the entry of the submission under 37 CFR 1.114 and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the application prior to entry under 37 CFR 1.114. Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action after the filing of a request for continued examination and the submission under 37 CFR 1.114. See MPEP § 706.07(b).

Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

15. A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

Art Unit: 1761

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.


16. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (571) 272-1402. The examiner can normally be reached on 7:00AM-3:30PM M-F.

17. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.


18. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR.

Status information for unpublished applications is available through Private PAIR only.

For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Robert Madsen 
Examiner
Art Unit 1761

RAM


MILTON I. CANO
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 1700